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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

In re S.B., a Person Coming Under the
Juvenile Court Law.

SAN MATEO COUNTY HUMAN
SERVICES AGENCY,

Plaintiff and Respondent,

v.

A.B.,

Defendant and Appellant.

A145409

(San Mateo County
Super. Ct. No. JUV83599)

Father A.B. appeals from the juvenile court's orders to deny his petitions to modify prior orders relating to visitation and reunification services, and to terminate his parental rights with respect to his two year old daughter, S.B. (hereinafter, minor), after finding inapplicable the beneficial parent-child relationship exception to Welfare and Institutions Code section 366.26.¹ We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On March 10, 2014, a petition was filed pursuant to section 300, subdivision (b)(1), alleging minor, born in June 2013, faced a substantial risk of serious physical harm or illness due to the failure or inability of mother and father to adequately supervise

¹ Unless otherwise stated, all statutory citations herein are to the Welfare and Institutions Code.

and protect her or to provide regular care due to their substance abuse and criminal conduct.² The petition alleged police officers lawfully entered the family home on March 6, 2014, and found stolen property, drugs (Oxycodone) and drug paraphernalia (pipes, straws, and foil with drug residue) in areas accessible to minor, as well as generally unsanitary living conditions. Both parents were arrested for possession of stolen property, possession of drug paraphernalia and child endangerment. Minor was taken into protective custody.

On March 11, 2014, following a detention hearing, minor was detained in foster care. Father, incarcerated in county jail, was ordered to receive weekly visitation with minor at the jail.

In anticipation of the April 1, 2014 jurisdiction hearing, respondent San Mateo Human Services Agency (agency) filed a report, noting, among other things, that father had been released from jail, but had been difficult to reach. Paternal grandmother had been interviewed, and stated that parents had been living “home to home” during mother’s pregnancy, but that, after minor’s birth, she permitted the couple to reside with her. However, paternal grandmother ultimately asked parents to leave because they were stealing from her and using drugs in her garage. According to police reports, father had been arrested in a string of burglaries and had initially reported having a year-long, daily drug habit. He had not yet engaged in services to address his substance abuse, and had continued to engage in criminal activity after minor’s removal. Specifically, on March 27, 2014, father was arrested on a new attempted burglary charge and detained in county jail. At the time of his arrest, father told the officer he had a \$300 per day Oxycodone habit (a statement he later denied making). Minor, in turn, had been moved to a new foster home due to capacity and licensing issues with her previous home.

On May 22, 2014, the agency prepared a report for the continued jurisdiction hearing, indicating father had entered Choices, a voluntary substance abuse treatment

² Mother is not a party to this appeal. As such, the allegations and any subsequent findings and orders as to mother are addressed only in passing.

program at the county jail where he was incarcerated. Both parents had visited with minor, and these supervised visits had gone well.

Following the jurisdiction hearing, the juvenile court sustained the petition, adjudged minor a dependant of the court, and ordered her to remain in foster care, with parents receiving supervised visitation and reunification services. The court further found father had so far made only minimal progress towards alleviating or mitigating the causes underlying minor's removal.

In the agency's report for the six-month review hearing, the social worker reported that father remained incarcerated facing seven felony burglary counts. Minor had bonded with her foster family, although she had been exhibiting signs of poor impulse control and decreased appetite following visits at which mother failed to appear. The foster family reported that minor was in great need of permanency (which they could not provide). After the hearing was continued to January 22, 2015 (more than ten months past minor's original detention), father reported that he had completed several classes in jail, successfully visited with minor on a regular basis, and hoped to enter Harbor Lights Residential Program in San Francisco upon his release, a two-year residential program for substance abusers who are single parents and have achieved at least six months of sobriety (hereinafter, Harbor House). Father further reported that most of the criminal charges against him had been dropped.

Following the review hearing, the juvenile court terminated reunification services after finding father's progress "minimal." A permanency planning hearing was thus scheduled for May 19, 2015, with parents to receive monthly supervised visits in the interim.

On April 8, 2015, father filed his first petition for modification pursuant to section 388, seeking increased visitation to twice weekly supervised visits, with the possibility of overnight visits at the agency's discretion, in light of his changed circumstances of being released from jail and residing in Harbor House. According to his petition, father was successfully participating in a wealth of programs aimed at substance abuse and reunification at Harbor House. Among other things, Harbor House has many services

designed to facilitate reunification, including on-site daycare and a program permitting parents and children to live together during the course of treatment. The petition further stated that father had regularly and consistently participated in weekly visitation with minor, which were going quite well for both minor and father. Father had been placed on probation for three years in three separate counties.

The agency submitted a report on April 30, 2015, indicating that minor had been placed with a new foster family willing and able to adopt her (hereinafter, foster/adopt family). In this new placement, minor was doing quite well. According to the agency, minor was benefitting from a “child-centered” home where her physical, emotional and social needs were being met. Minor was sleeping and eating well, and exhibiting no behaviors or concerns. Minor called her foster/adopt mother, “mommy,” and had become very attached to her.

Following a contested hearing, the juvenile court denied father’s first modification petition without prejudice after the court found that increased visits were not in minor’s best interest and father indicated his intent to file a new petition seeking reinstatement of reunification services. The court stated that it would consider father’s second modification petition on the day of, and prior to, the permanency planning hearing, “when we’re looking at the whole picture.”

On May 13, 2015, father filed his second petition for modification asking the juvenile court to either reinstate reunification services and increase visitation, or to return minor to his custody at Harbor House with family maintenance services on the condition that he remain there. The agency, in turn, filed a written opposition to the petition, arguing that minor’s best interests would not be served by granting father’s requests. Among other things, the agency’s opposition stated that, according to the social worker, the foster/adopt mother had reported that minor was confused by visitation with parents, and often appeared stressed, anxious, and clingy to her foster/adopt mother after returning from the visits. The opposition further noted that, because father had been at Harbor House just two months, his ability to remain sober and provide adequate care for minor was unknown.

In anticipation of the petition for modification/permanency planning hearing, scheduled for May 19, 2015, the agency recommended termination of both parents' parental rights. The agency also reported minor was doing very well in her placement with the foster/adopt family, and that this family, who also had a six year-old daughter, had confirmed its desire to adopt minor. The agency further reported that minor, who was particularly close to the foster/adopt mother, was healthy and developmentally on track with the exception of a slight speech delay. The foster/adopt family had a strong and supportive network of friends and family, and flexible careers that permitted them to provide full-time care for minor. Minor had been enrolled in several summer classes (including music and gymnastics), and enjoyed reading, playing games, and other activities with this family. Finally, while minor was having "positive" visits with father (who "deserves credit" for his progress), the agency believed that, given father's criminal and substance abuse history and minor's need for consistency and permanency, it was in minor's best interests to remain with the foster/adopt family in a permanent adoptive placement.

Following the contested hearing on father's section 388 petition and permanency planning, the juvenile court adopted the agency's recommendation to terminate parental rights. Specifically, after hearing from several witnesses (including father, the social worker, and father's Harbor House recovery counselor), the court first found that father's modification requests were not in minor's best interest and, in fact, would be detrimental to her at this point. Then, proceeding to the permanency planning issue, the court found by clear and convincing evidence that minor was likely to be adopted and declined to find that terminating parental rights would be detrimental to her. In doing so, the court rejected father's contention that the "beneficial parent-child relationship" exception to the statutory preference for adoption as the permanent plan should apply in his case. (See § 366.26, subs. (c)(1)(B)(i).) While crediting father for maintaining regular visitation and progressing with his recovery, the juvenile court ultimately concluded he could not "establish that the child would benefit from continuing the relationship to the extent that

it would outweigh the security and sense of belonging of the new family that is addressing [her] needs and providing a safe environment.”

On June 16, 2015, father filed a timely notice of appeal of the juvenile court’s May 5, 2015 and May 19, 2015, orders and findings.

DISCUSSION

Father contends the juvenile court erred, first, in denying his two petitions for modification of prior juvenile court orders relating to visitation and reunification services (§ 388) and, second, in ordering termination of his parental rights with respect to minor after selecting adoption as minor’s permanent plan (§ 366.26). The governing law, set forth below, is generally not in dispute.

I. Denial of Father’s Petitions for Modification (§ 388).

Before and after reunification services are terminated, a parent has a continuing right to petition the court pursuant to section 388 for a modification of any order in the case based on a showing of changed circumstances or new evidence. (§ 388.) In bringing the petition, the parent has the burden to prove by a preponderance of the evidence that changed circumstances exist and that the proposed modification would be in the child’s best interest. (*Nahid H. v. Superior Court* (1997) 53 Cal.App.4th 1051, 1068; Cal. Rules of Court, rule 5.570(a)(e).)

A juvenile court’s decision to grant or deny a section 388 petition will not be disturbed on appeal absent a clear abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) In applying this standard, we keep in mind that “[s]ection 388 plays a critical role in the dependency scheme. Even after family reunification services are terminated and the focus has shifted from returning the child to his parent’s custody, section 388 serves as an ‘escape mechanism’ to ensure that new evidence may be considered before the actual, final termination of parental rights. (Citation.) It ‘provides a means for the court to address a legitimate change of circumstances’ and affords a parent her final opportunity to reinstate reunification services before the issue of custody is finally resolved. (Citation.)” (*In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1506; see

also *In re Marilyn H.* (1993) 5 Cal.4th 295, 307 [section 388 is one of the “significant safeguards” built into the dependency scheme to ensure parents receive due process].)

Here, father contends the juvenile court’s rulings to deny his section 388 petitions were an abuse of discretion because, as a matter of law, he proved his circumstances had changed such that increased visitation and further services (if not minor’s return to his care) were in minor’s best interests. According to his petitions, since reunification services terminated, father had on his own initiative entered the two-year Harbor House residential treatment program and had, while there, found part-time employment and fully participated in a plethora of Harbor House programs designed to help resident single parents remain sober, gain life skills and successfully reunify with their children. As father points out, Harbor House has many services specifically designed to facilitate reunification, including on-site daycare and a program permitting parents and children to live together during the course of the parent’s treatment. In addition, the petitions reported that father had regularly and consistently participated in weekly visitation with minor, which, according to both father and Harbor House staff, had been positive, loving and affectionate. In particular, during these visits, father actively engaged minor in games, reading, and coloring, and competently cared for her needs. Finally, at the hearing on his petitions, father admitted his past problems and failings, yet claimed to be willing to do everything possible to regain custody of minor.

However, even accepting father’s evidentiary showing of progress in his treatment, as reflected in the agency’s opposition to father’s petition, father’s ability to remain sober and provide adequate care for minor remained uncertain. The social worker testified that minor’s foster/adopt parents had described minor as stressed and anxious after visits with both parents. The social worker also pointed out that father, to this point, had enjoyed only short-term supervised visits with minor, and no unsupervised or overnight visits. Further, minor, nearly two years old, had become very attached to her foster/adopt family, and had not lived with father in well over a year. According to the social worker, minor’s primary needs by that point were permanency and stability rather than reunification.

In agreeing with the agency's recommendation to deny father's section 388 petitions, the juvenile court acknowledged the evidence of father's progress in his residential treatment program. Indeed, the juvenile court congratulated father on his recent successes before ultimately finding that father's circumstances were not "changed," as section 388 requires, but merely "changing." In doing so, the juvenile court noted father's long history of substance abuse and criminal activity, which continued past minor's removal, and his relatively recent strides to achieve sobriety. Thus, after weighing the stability of minor's current placement against the risks associated with returning her to father's care, the juvenile court concluded father had not met his burden of proving the proposed modifications were in minor's best interest.

As this record demonstrates, the juvenile court appropriately considered a multitude of relevant factors in denying father's section 388 petitions, including the seriousness of his substance abuse and criminal behavior that led to minor's dependency, the degree to which these problems have been addressed or eliminated by father, and the strength of minor's bond to father. (*Nahid H. v. Superior Court*, *supra*, 53 Cal.App.4th at p. 1068; Cal. Rules of Court, rule 5.570(a)(e).) However, as the juvenile court reasonably found, father's showing of changed circumstances was insufficient to warrant modification of the prior orders. (See *In re Dakota H.* (2005) 132 Cal.App.4th 212, 229.) Simply put, the record reflects that additional reunification services or visitation would have added to the time during which minor has been deprived of a stable and secure home and, in light of father's still-ongoing efforts to address his by-all-means significant past problems, would not necessarily have made reunification of his family more likely. As such, the juvenile court's decisions to deny modification were proper exercises of discretion. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 463-464.)

II. Termination of Father's Parental Rights.

Father's remaining challenge is to the order terminating his parental rights. Under the applicable statutory law, "[a]t a permanency plan hearing, the court may order one of three alternatives: adoption, guardianship or long-term foster care. [Citation.] If the

dependent child is adoptable, there is a strong preference for adoption over the alternative permanency plans. [Citations.]” (*In re S.B.* (2008) 164 Cal.App.4th 289, 296-297.)

“Once the court determines the child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1). [Citation]; but see § 366.26, subdivision (c)(1)(A), eff. Jan. 1, 2008.)” (*In re S.B.*, *supra*, 164 Cal.App.4th at p. 297.) The fact that the juvenile court has continued a child’s removal from parental custody and has terminated reunification services is a sufficient basis for terminating parental rights absent a compelling reason for determining such termination would be detrimental to the child due to the existence of one of the circumstances specified in section 366.26, subdivision (c)(1). (See *id.*; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351-1352.)

In reviewing a decision to terminate parental rights, we uphold the juvenile court’s factual findings so long as they are supported by substantial evidence. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.) In making this determination, we “do not evaluate the credibility of witnesses, reweigh the evidence, or resolve evidentiary conflicts. Rather, we draw all reasonable inferences in support of the findings, consider the record most favorably to the juvenile court’s order, and affirm the order if supported by substantial evidence even if other evidence supports a contrary conclusion. [Citation.] The appellant has the burden of showing the finding or order is not supported by substantial evidence. [Citation.]” (*Ibid.*) However, at the same time, most courts have also held that the determination of whether termination of parental rights would serve the child’s best interest is left to the juvenile court’s discretion.³ (See *In re Eric B.* (1987) 189

³ As our colleagues in the Sixth District persuasively explained: “In our view, both standards of review come into play in evaluating a challenge to a juvenile court’s determination as to whether the parental or sibling relationship exception to adoption applies in a particular case. Since the proponent of the exception bears the burden of producing evidence of the existence of a beneficial parental or sibling relationship, which is a factual issue, the substantial evidence standard of review is the appropriate one to apply to this component of the juvenile court’s determination. . . . [¶] The same is not true

Cal.App.3d 996, 1005 [juvenile court's determination of child's best interests will not be reversed absent a clear abuse of discretion]; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.)

In this case, father does not challenge the juvenile court's initial finding that minor is presently adoptable. Father does challenge, however, the court's finding that terminating his parental rights would not be to minor's detriment based on the beneficial child-parent relationship exception under section 366.26, subdivisions (c)(1)(B)(i). According to father, he meets the requirements of the beneficial child-parent relationship exception because, consistent with the statutory language, he has "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (See § 366.26, subd. (c)(1)(B)(i).)

With respect to the first requirement, to wit, proof that regular visitation has been maintained, the People do not dispute this fact. Nor could the People do so. The record undoubtedly proves father has, since removal and even while incarcerated, consistently visited with minor, at least once, if not twice, weekly.

We thus turn to the second requirement of the relevant statutory provision, which is proof that minor, if adopted, would be deprived of a beneficial parent-child relationship such that terminating father's parental rights would cause detriment to minor. Case law has adopted the following standard for making this showing: "When determining whether the exception applies to bar termination of parental rights, the court balances the

as to the other component of these adoption exceptions. The other component of both the parental relationship exception and the sibling relationship exception is the requirement that the juvenile court find that the existence of that relationship constitutes a '*compelling reason* for determining that termination would be detrimental.' (§ 366.26, subd. (c)(1)(B), *italics added*.) A juvenile court finding that the relationship is a '*compelling reason*' for finding detriment to the child is *based* on the facts but is not primarily a factual issue. It is, instead, a '*quintessentially*' discretionary decision, which calls for the juvenile court to determine the *importance* of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the child of adoption. [Citation.] Because this component of the juvenile court's decision is discretionary, the abuse of discretion standard of review applies." (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.)

strength and quality of the parent-child relationship in a tenuous placement against the security and sense of belonging that a stable family would confer on the child. However, if severing the existing parental relationship would deprive the child of ‘a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.’ [Citation.] In other words, if an adoptable child will not suffer great detriment by terminating parental rights, the court must select adoption as the permanency plan. (See § 366.26, subd. (c)(1).)” (*In re Dakota H.*, *supra*, 132 Cal.App.4th at p. 229; see also *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1419 [“ ‘Interaction between [a] natural parent and child will always confer some incidental benefit to the child The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.’ (*In re Autumn H.* [(1994)] 27 Cal.App.4th [567,] 575.)”].) This required showing is consistent with the concept, already discussed at length above, that, at this late juncture in dependency proceedings, the juvenile court must focus on the child’s need for permanency and stability rather than the parents’ interest in reunification. (E.g., *In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.)

Here, the juvenile court found the beneficial parent-child relationship exception inapplicable. In doing so, the juvenile court correctly focused on the best interests of minor, including the facts that: (1) minor, nearly two years old at the time of the permanency planning hearing, had not lived with father since she was nine months old; (2) minor had become quite attached to her foster/adopt family, which was undoubtedly capable and prepared to provide for her care; (3) father had not had any unsupervised or overnight visits with minor, and was just beginning his road to recovery from substance abuse; (4) it was unknown whether father could reside with minor at Harbor House for the entire two-year period; (5) father’s past problems with crime and substance abuse were significant; and (6) because father’s reunification services had terminated, the court was required to focus on minor’s need for permanency and stability, which the foster/adopt family in this case had demonstrated that it could provide, rather than

father's desire to reunify. The court thus concluded under the circumstances of this case that the permanent plan of adoption should be implemented.

The record, as described at length above, adequately supports the court's decision-making. (See *In re Eric B.*, *supra*, 189 Cal.App.3d at p. 1005 [juvenile court's determination of child's best interests will not be reversed absent a clear abuse of discretion].) In so concluding, we agree without question that father has a meaningful and positive bond with minor. However, California law requires more than that; it requires a "significant, positive, emotional" bond. (*In re Beatrice M.*, *supra*, 29 Cal.App.4th at p. 1419.) Here, the juvenile court had valid lingering concerns about father's current ability to care for and protect minor from harm, such that it properly exercised its discretion to find that no such significant, positive emotional bond exists. (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at pp. 1351-1352 [where, despite successful visitation, parent had "made no steps toward overcoming the problems leading to [minor's] dependency," the beneficial parent relationship exception did not apply]. Cf. *In re S.B.*, *supra*, 164 Cal.App.4th at p. 300, *italics added*, [court erred in declining to apply the beneficial parental relationship exception where the record established "[father's] devotion to S.B. was constant, as evinced by his *full compliance* with his case plan and continued efforts to regain his physical and psychological health"].) Simply put, in this case, the evidence of a bond between father and minor based upon the limited amount of supervised time they spent together simply did not outweigh the evidence of a bond between minor and the foster/adoptive family, which undisputedly wished to adopt minor and had a demonstrated ability to provide a stable, healthy, and loving home for her. As such, the juvenile court's rejection of the beneficial parent-child relationship exception as a basis for maintaining parental rights must stand.

DISPOSITION

The juvenile court's findings and orders of May 5, 2015 and May 19, 2015 are affirmed.

Jenkins, J.

We concur:

Pollak, Acting P. J.

Siggins, J.

In re S.B., A145409